THE VANISHING RATE-MAKING POWER OF THE STATES.

"Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency."[1]

These words are contained in the unanimous opinion, written by Mr. Justice Hughes, of the Supreme Court of the United States in the Minnesota Rate Cases, wherein it was decided that the authority of a State to prescribe reasonable maximum rates for intrastate transportation is absolute and plenary only, to use the words of the Court, "until Congress does act and by its valid interposition limits the exercise of the local authority."[2] How is this principle to be reconciled with the statement of the Court first quoted? If the power of the State may be thus restricted, may not there be total destruction of "local efficiency" in so far as rate-making is concerned? The phrase "without unnecessary loss of local efficiency" is at once misleading. As the Court said, "the situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the Court, which involve the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky and Oregon. Differences in particular facts appear, but they cannot be regarded as controlling."[3] Stated briefly in another form,

[1]The Minnesota Rate Cases. Simpson *et al.*, constituting the Railroad & Warehouse Commission of the State of Minnesota *v.* Shepard; Same *v.* Kennedy; Same *v.* Shillaber (1913) 230 U. S. 352, 402.

[2]*Ibid.* p. 412.

[3]*Ibid.* p. 394. These appeals have all been decided in conformity with the opinion in the Minnesota cases. See Missouri Rate Cases (1913) 230 U. S. 474, Mr. Justice Hughes (496-7): "We need not review the argument addressed to conditions of transportation in Missouri and the relation of intrastate to interstate rates for while the case has its special facts by reason of the location of the State, and the use of the Mississippi and Missouri rivers as basing points in rate-making, the controlling question thus presented with reference to the authority of the State to prescribe reasonable intrastate rates throughout its territory, unless limited by the exercise on the part of Congress of its constitutional power over interstate commerce and its instruments, is not to be distinguished in any material respect from that which was considered and decided in the *Minnesota Rate Cases, ante,* p. 352. For the reasons stated in the opinion in those cases, it must be held that the court below properly refused to sustain this objection to the Missouri statutes." Knott *et al. v.* St. Louis S. W. Ry. Co. and 14 other cases (1913) 230 U. S. 509; Knott *et al. v.* St. Louis, K. C. & Col. R. R. Co. (1913) 230 U. S. 512; Oregon R. R. & Nav. Co. *v.* Campbell *et al.* (1913) 230 U. S. 525. Mr. Justice Hughes (536): "Assuming that the order applies exclusively to intrastate transportation, the question with respect to asserted interference with interstate commerce by reason of the relation of intrastate rates to interstrate rates is essentially the same as that presented in the

the Court held that the power of the States over intrastate rates is not plenary but servient to the power of Congress over interstate rates. This article is an attempt to demonstrate that this principle, economically wise as it doubtless is, overrules all prior decisions of the Supreme Court and thereby extends, contrary to general belief, the scope of the Commerce Clause of the Constitution beyond all the limits, either express or implied, in those prior decisions, and embodies the most far-reaching expression of the great dominant characteristic in the present-day development of our constitutional law, namely, the gradual yet steady growth of national power at the expense of the States, through judicial interpretation, or often through what is more properly to be termed judicial amendment of the Constitution, or nullification by indirection. On the facts in those cases the Court need not have gone as far as it did in order to reach its main conclusion, namely, that the Minnesota rates were valid. Nevertheless, the Court, by its method of reasoning, unquestionably made the principle just stated a necessary part of its *ratio decidendi.* But even assuming this principle to be *obiter dictum,* the inevitable consequences of its announcement are too far-reaching to warrant its being passed over without careful study.

Minnesota Rate Cases, ante, p. 352, and the same conclusions must be reached." Southern Pac. Co. & Ore. & Calif. R. R. Co. *v.* Campbell *et al.* (1913) 230 U. S. 537, Mr. Justice Hughes (547): "The first, and principal, contention of the appellants, is that this requirement was invalid as constituting a regulation of interstate commerce. The order, however, related solely to intrastate traffic, and the question raised by the bill, so far as its allegations bear upon the conditions of interstate transportation, does not differ in its essential feature from that which was passed upon in the Minnesota rate cases. *Minnesota Rate Cases, ante,* p. 352. This objection to the order cannot be sustained." Allen *et al. v.* St. Louis, I. M. & So. Ry. Co.; Same *v.* St. Louis S. W. Ry. Co. (1913) 230 U. S. 553, Mr. Justice Hughes (555): "The contention of the complainants based upon the asserted interference with interstate commerce was rightly overruled by the court below (*Minnesota Rate Cases, ante,* p. 352), and the only question which remains for our consideration is whether the proof was sufficient to sustain the finding of confiscation." Louisville & N. R. R. Co. *v.* Garrett *et al.,* (1913) 34 Sup. Ct. Rep. 48, Mr. Justice Hughes: "It is also objected that the order of the commission constitutes an unwarrantable interference with, and a regulation of interstate commerce. The questions thus raised cannot be distinguished from those which were considered and decided in The Minnesota Rate Cases, 230 U. S. 352."

See also, Chesapeake & O. Ry. Co. *v.* Conley (1913) 230 U. S. 513, Mr. Justice Hughes (524): "The final objection to the statute [of West Virginia] is that it constitutes an unconstitutional interference with interstate commerce. It must be regarded, however, as prescribing rates exclusively for intrastate traffic, and, as thus construed, it was within the power of the State to enact. The questions presented are substantially the same as those which were considered in the *Minnesota Rate Cases, ante,* p. 352."

I.

The facts in the Minnesota Rate Cases are briefly as follows: The state line of Minnesota on the east and west runs between cities which are in close proximity, that is, there are various twin cities, such as Superior, Wisconsin, and Duluth, Minnesota; Grand Forks, North Dakota, and East Grand Forks, Minnesota, which, on account of their situations, had always been accorded by the railroad companies serving them like rates in and out. In 1905 and 1906 the State Railroad and Warehouse Commission of Minnesota, pursuant to acts of the State legislature, ordered reduced the class rates on general merchandise twenty and twenty-five per cent., and corresponding reductions were made in commodity and passenger rates. Simultaneously with this compulsory reduction of intrastate rates the railroads involved, namely, The Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis & St. Louis Railroad Company, in order to prevent discrimination against localities and the consequent loss of business, reduced to a parity their interstate rates to the corresponding twin cities in each group lying outside the State of Minnesota. Whereupon the stockholders of these roads brought suit to restrain the enforcement of these acts of the legislature and orders of the Commission. The stockholders' contentions were: First, that the newly established rates amounted to an unconstitutional interference with interstate commerce; second, that they were confiscatory; and third, that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law in violation of the Fourteenth Amendment. The lower court sustained the latter contention, which was affirmed by the United States Supreme Court on appeal, the penal and criminal provisions only of the statutes being considered.[4] The lower court then referred the suits to a special master who took the evidence and made an elaborate report sustaining the complainants' other contentions. The master's findings were confirmed by the United States Circuit Court for the District of Minnesota (Judge Sanborn) and decrees were entered accordingly.[5] From these decrees the Attorney-General

[4] *Ex parte* Young (1907) 209 U. S. 123. Although the rate provisions of the statutes were left unsettled so far as the question of interference with interstate commerce was concerned, Mr. Justice Peckham, in rendering the opinion, took occasion to remark (p. 145) that "the question is not, at any rate, frivolous."

[5] (1911) 184 Fed. 765.

of the State and the members of the State Commission appealed to the Supreme Court. Appreciating the gravity of the controversy, the railroad commissioners of eight States[6] filed their brief as *amici curiae,* as did also the governors of three States,[7] pursuant to a resolution of a conference of the governors of all the States.

The question of the validity of the acts and orders fixing maximum rates was thus presented in two distinct aspects: (1) with respect to their effect on interstate commerce, and (2) as to their alleged confiscatory character. With this second aspect we are not here concerned, and for the purposes of our inquiry the rates fixed by the State will be assumed to be reasonable so far as intrastate traffic is concerned (as they were in fact for the most part found to be by the Supreme Court), that is, rates which the State in the exercise of its legislative judgment could constitutionally fix for intrastate transportation separately considered. With respect to the branch of the cases with which we are here concerned, namely, the effect of these rates upon interstate commerce, the decree of the lower court which was under review rests upon two grounds: First, that the action of the State imposed a direct burden upon interstate commerce; and second, that it was in conflict with the provisions of the act to regulate commerce.[8] Mr. Justice Hughes in the opinion of the Court said:

"These grounds are distinct. If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the State, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted."[9]

Turning to the first question, namely, whether the action of the State of Minnesota in prescribing new and lower intrastate rates thereby imposed a direct burden upon interstate commerce, the conclusion of the Court that it did not must be accepted as sound.

[6] Nebraska, Iowa, Kansas, South Dakota, North Dakota, Oklahoma, Missouri and Texas.

[7] Ohio, Nebraska and Missouri.

[8] 230 U. S. 396.

[9] 230 U. S. 396-7.

But the qualification placed by the Court, without a dissenting vote to be sure, upon the State's authority over intrastate rates is believed to contain an enunciation of Congressional power which, as previously stated, was not only unnecessary for the decision in these cases, but which has no support in former decisions, and which, furthermore, if acted upon in future instances, may give rise to an alarming conflict between state and federal interests detrimental to the preservation of our dual form of government.

"Was the State," asks Mr. Justice Hughes, "in prescribing a general tariff of reasonable intrastate rates otherwise within its authority, bound not to go below a minimum standard established by the interstate rates made by the carriers within competitive districts? If the state power, independently of Federal legislation, is thus limited, the inquiry need proceed no further."[10] The Court declares that the state power is not so limited because, as Chief Justice Marshall indelibly wrote upon our constitutional jurisprudence in the case of *Gibbons* v. *Ogden*,[11] the completely internal commerce of a State is reserved for the State itself. But, adds the Court,

"This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405, 426; *The Daniel Ball*, 10 Wall. 557, 565; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618, 619; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Mondou* v. *New York, N. H. & H. R. R. Co.*, 223 U. S. 1, 47, 54, 55.

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of inter-

[10] 230 U. S. 397-8.

[11] (1824) 9 Wheat. 1, 195.

state commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. *Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Ex parte McNiel,* 13 Wall. 236, 240; *Welton* v. *Missouri,* 91 U. S. 275, 280; *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 204; *Bowman* v. *Chicago etc. Railway Co.,* 125 U. S. 465, 481, 485; *Gulf, Colorado & Santa Fé Ry. Co.* v. *Hefley,* 158 U. S. 98, 103, 104; *Northern Pacific Ry. Co.* v. *Washington,* 222 U. S. 370, 378; *Southern Ry. Co.* v. *Reid,* 222 U. S. 424, 436.

"The principle, which determines this classification, underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."[12]

Considering first those subjects which require a general system or uniformity of regulation and over which therefore the power of Congress is exclusive, the Court cites a great number of cases[13] maintaining the freedom of interstate commerce from all modes of direct interference by the States, the most typical example of which being, of course, taxation in its varied forms.

The Court then proceeds, by an exhaustive digest of cases,[14] to consider those matters admitting of diversity of treatment according to the special requirements of local conditions, wherein the States may act within their respective jurisdictions until Congress sees fit to act. The leading illustrations as noted by the Court may be classified as follows: pilotage, protection and improvement of navigable waters; regulation of wharfage charges or tolls; quarantine regulations; inspection laws and laws governing nonfeasance or misfeasance of interstate carriers. Completing its review of the decisions, the Court thus summarizes its conclusions:

[12] 230 U. S. 399-400.

[13] 230 U. S. 400-402.

[14] *Ibid.* p. 403-411.

"Within the state power, then, in the words of Chief Justice Marshall, is 'that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to a general government: all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress: and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.' *Gibbons* v. *Ogden, supra,* pp. 203, 204.

"And, wherever as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of local authority."[15]

Whereupon the Court, with a directness and brevity that is almost startling, asserts, "These principles apply to the authority of the State to prescribe reasonable maximum rates for intrastate transportation."[16] But do they? Do the words "among the States," "affect other States," or "affect the States generally" as defined in *Gibbons* v. *Ogden*[17] and subsequent decisions admit of such construction? It is believed that an affirmative answer to these questions finds no support in any decision of the Supreme Court. Herein lies the radicalism and, it is believed, also the weakness of the Court's opinion. The remarkable prescience of the members of the Court is doubtless responsible for this absence of proof. At least it is difficult of explanation in any other way than by saying that the Justices foresaw and feared the economic difficulty that would inevitably arise in the almost immediate future had they dismissed the cases with an opinion that the power of the States over intrastate rates was unqualifiedly plenary within their given sphere. They fully realized that new physical conditions had produced the anomaly of a double action of legal powers upon business which is, and which should be, economically speaking, a unit and under the control of one body, the national government. They appreciated the gravity of the situation, and saw that some measure was unquestionably needed to relieve the business of transportation

[15] 230 U. S. 411-12.

[16] *Ibid.* p. 412.

[17] (1824) 9 Wheat. 1, 194.

from the confusing and destructive dominance and jealousies of numerous state commissions, whereby effective authority on the part of the Interstate Commerce Commission was vitiated. So, as it seems, constructive statesmanship absorbing their minds at the expense of a more narrow, yet a more correct judicial course of reasoning, they vaulted the difficulty and dismissed the question as having been settled by prior decisions, after five pages[18] devoted to an unconvincing analysis of decisions,—unconvincing, because in none of the cases cited by the Court, and it is believed in none others that have been decided, do we find any enunciation of the doctrine that the power of the States over intrastate rates is servient to the power of Congress over interstate rates. On the contrary, all of the decisions assert that the State's power is and always has been, since the adoption of the Constitution, unqualifiedly plenary within its own sphere. This must be true from the very character of our dual form of government, under which the federal government possesses no powers except what have been expressly granted to it by the States, while the latter possess the residuum of powers in their entirety. Therefore, the extent of the power over interstate commerce is limited by the express terms of its grant, just as is any other power that the States under the Confederation yielded up to Congress; that is to say, its sphere of operation is limited to the given subject.[19]

[18] 230 U. S. 413-17.

[19] It is interesting to note that while the States conceded to the federal government, with virtually no debate in either the federal or state conventions, the power to regulate interstate commerce in order to cure one of the greatest defects in the Confederation, namely, state jealousy in relation to foreign trade, this power was thought to be merely negative and preventive, not affirmative. See Elliott's Debates on the Federal Constitution; The Federalists, Nos. 7, 11, 42; Max Ferrand, The Records of the Federal Convention of 1787; The Framing of the Constitution.

On February 13, 1827, James Madison, writing from his home at Montpelier to his friend J. C. Cabell, remarked in regard to the power of Congress over interstate commerce: "I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it, yet it is very certain that it grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves rather than as a power to be used for the positive purpose of the general government in which alone, however, remedial power could be lodged." Letters and Other Writings of James Madison, vol. 4, pp. 14-15.

Strange as it seems, this was written three years after the decision in Gibbons *v.* Ogden. Madison's successor in the Presidency, James Monroe, actually believed that Congress had no power to make internal improvements by virtue of the Commerce Clause of the Constitution, on

The power to tax, as Chief Justice Marshall said, is the power to destroy, so the federal government cannot tax state instrumentalities,[20] and *vice versa* a State may not tax the instrumentalities of the federal government.[21] Similarly, while the treaty power, which is vested in the President and the Senate, is supreme, it may not be so arbitrarily extended as to usurp other powers granted either to the federal government or to the States.[22] It may be abused to be sure, yet this is not usurpation. A colorable exercise of a power is not a valid exercise of a power, and, therefore, just as a treaty must be confined to those matters which are properly subjects for international, not internal, negotiations, just so must the exercise by Congress of its power over interstate commerce be confined to matters which are actually within the domain of interstate commerce. Congress cannot under the guise of this power usurp other fields of governmental regulation, whether belonging properly to the States or to the federal government.

First, let us analyze the language of the cases relied upon in the opinion of the court. The first cases considered by the court are *Chicago, Burlington & Quincy R. R.* v. *Iowa*,[23] *Peik* v. *Chicago & Northwestern Ry. Co.*,[24] *Winona & St. Peter R. R. Co.* v. *Blake*,[25] and *Munn* v. *Illinois*.[26] Mr. Justice Hughes thus summarizes these famous cases, generally known as the "Granger Cases":

"The question was presented by acts of the legislatures of Illinois, Iowa, Wisconsin and Minnesota passed in the years 1871 and 1874 in response to a general movement for a reduction of rates.

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the theory that that clause merely gave power to impose duties on foreign trade, and to prevent duties on trade between the States, or in fact by virtue of any other power granted to Congress. See James Monroe's Message to Congress of May 4th, 1822, and accompanying paper on the subject of internal improvements, vetoing the act for the preservation and repair of the Cumberland Road.

[20]Collector *v.* Day (1870) 11 Wall. 113. But see, also, Veazie Bank *v.* Fenno (1869) 8 Wall. 533; South Carolina *v.* United States (1905) 199 U. S. 437.

[21]M'Culloch *v.* Maryland (1819) 4 Wheat. 316; California *v.* Pacific R. R. Co. (1888) 127 U. S. 1.

[22]Mr. Charles F. Burr has written a masterly treatise dealing in a most exhaustive way with the relations of treaties to state laws, entitled The Treaty-Making Power of the United States and the Methods of its Enforcement, as Affecting the Police Powers of the States.

[23](1876) 94 U. S. 155.

[24](1876) 94 U. S. 164.

[25](1876) 94 U. S. 180.

[26](1876) 94 U. S. 113. See also Chicago, M. & St. P. R. R. Co. *v.* Ackley (1876) 94 U. S. 179; Stone *v.* Wisconsin (1876) 94 U. S. 181.

The section of the country in which the demand arose was to a large degree homogeneous and one in which the flow of commerce was only slightly concerned with state lines. But resort was had to the States for relief. In the Munn case, the court had before it the statute of Illinois governing the grain warehouses in Chicago. Through these elevators, located with the river harbor on the one side and the railway tracks on the other, it was necessary according to the course of trade for the product of seven or eight States of the West to pass on its way to the States on the Atlantic Coast. In addition to the denial of any legislative authority to limit charges it was urged that the act was repugnant to the exclusive power of Congress to regulate interstate commerce. The court answered that the business was carried on exclusively within the limits of the State of Illinois, that its regulation was a thing of domestic concern and that 'certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.' In the decision of the railroad cases, above cited, the same opinion was expressed. The language of the court, however, went further than to sustain the State law with respect to rates for purely intrastate carriage. Thus, the act of Wisconsin covered traffic which started within the State and was destined to points outside, and this was treated as being within the state power (Peik *v.* Chicago & Northwestern Railway Co., 94 U. S. 164, 177, 178), a view which was later repudiated. Wabash, St. L. & P. Railway Co. v. Illinois, 118 U. S. 557."[27]

Note carefully that the dormant power referred to in *all* of these cases was the power of Congress over interstate commerce, for the question was whether the States could regulate this commerce in the absence of Congressional regulation, and not, as in the Minnesota cases, whether Congress could ever regulate intrastate commerce. Obviously the one proposition is the converse of the other. Just as in *Munn* v. *Illinois,* the phrase "until Congress acts" is used in two of the other cases, but is directly followed by words of explanation similar to those used in *Munn* v. *Illinois.* Thus, the exact words in *Chicago, Burlington and Quincy R. R. Co.* v. *Iowa* are:

"It [the railroad] is employed in State as well as in inter-state commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing that without may be indirectly affected."[28]

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[27] 230 U. S. 413-14.

[28] 94 U. S. 163.

In *Peik* v. *Chicago & Northwestern Ry. Co.*, Mr. Chief Justice Waite again said:

"The law is confined to State commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."[29]

In the remaining case, *Winona & St. Peters R. R. Co.* v. *Blake*, the Chief Justice, after delivering a very short opinion, simply stated that the case fell directly within the Court's rulings in the previous cases.

Obviously, the above language might even now be used in support of the converse principle, namely that a State may regulate charges for interstate traffic, as long as the Congressional power is dormant, were it not for the fact that, as the Court in the Minnesota cases points out, such a view was soon repudiated in *Wabash, St. L. & P. Ry. Co.* v. *Illinois*.[30] "But," said Mr. Justice Hughes in referring to this case, "no doubt was entertained of the State's authority to regulate rates for transportation that was wholly intrastate."[31] More than this, Mr. Justice Miller in delivering the opinion of the Court and in repudiating the doctrine of the earlier cases that until Congress acted, the States might regulate interstate commerce, used these words: "though it is true that * * * the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the States, was presented, it received but little attention at the hands of the court, and was passed over with the remarks in the opinions of the court which have been cited."[32] All of these remarks have just been quoted. This principle received *no* attention at the hands of the court in the Wabash case. How then can any of these cases be properly considered as authority, in even the slightest degree for the principle of a dominant

[29] 94 U. S. 177-8.

[30] (1886) 118 U. S. 557.

[31] 230 U. S. 415.

[32] 118 U. S. 569-70.

Federal and a servient State power as announced by Mr. Justice Hughes?[33]

From the remaining case relied upon by the Court in this branch of its opinion, namely *Stone* v. *Farmers Loan and Trust Co.*,[34] one of the so-called Railroad Commission cases, Mr. Justice Hughes quotes the following language, affirming the plenary power of the State over its internal commerce and giving no suggestion that this power is servient to Congress: "It [the State] may, beyond all question, by the settled rule of decision in this court, regulate freight and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi."[35]

So much for the cases relied upon by the Court. In the subsequent branch of its opinion, wherein the scope of the Interstate Commerce Act is discussed (which we shall consider later), numerous other cases of similar import are cited, but in none of them is

[33]This principle seems to have been predicted, with little reasoning, however, in one or two opinions of courts of inferior jurisdiction, and by one or two authors. See especially Woodside *v.* Tonnopah & G. R. Co. *et al.* (1911) 184 Fed. 358, Morrow (Circuit Judge), p. 360: "That is the main feature of the Southern Pacific Case, that it interferes with interstate commerce. Ultimately this charge resolves itself into a constitutional question, whether the order of the railroad commissioners is an interference with the exclusive power of Congress to regulate commerce among the several states. The present rate for transporting forest products from points in California to points in Nevada has been fixed by the railroad and not by the authority of the Interstate Commerce Commission. The order of the railroad commission does not, therefore, interfere with any authority of the federal government to regulate commerce between the several states, that authority not having been expressed or declared."

David W. Fairleigh, Congress and Intra-state Commerce, 9 Columbia Law Rev. 38, 45: "The several states now have power to regulate the Federal agency with respect to its intra-state State traffic, only because Congress has not yet seen fit to exercise its full powers. Whenever Congress shall fully occupy the entire scope of its powers, all State statutes regulating the intra-state traffic of interstate railroads will be instantly suspended, and all governmental friction resulting from diverse and inconsistent legislation will be avoided.

"It is wholly unimportant in the application of the principles here stated whether the interstate railroad company is incorporated under State laws or by act of Congress; in either case it is equally an agency of the government of the United States, because it is an agency of interstate commerce, over which Congress has the power of regulation. The power of Congress to control the instrumentality is not dependent upon the mode in which the instrumentality was created."

This theory of agency is unconvincing and totally unsupported by authority.

[34](1886) 116 U. S. 307.

[35]*Ibid.* p. 334.

language found which in any way qualifies the principle that the State's power over intrastate rates is plenary. "The decisions of this court since the passage of the act to regulate commerce," says Mr. Justice Hughes, "have uniformly recognized that it was competent for the State to fix such rates, applicable throughout its territory. If it be said that in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of state-wide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of state authority."[36] Then follows an analysis of decisions, all of which confirm in unmistakable terms the plenary power of the States.[37]

It seems scarcely necessary after the extensive consideration of cases by the Court, to add others to the list, but the language in at least two authorities, not mentioned by the court, is particularly appropriate to the question under review.

In *Sands* v. *Manistee River & Improvement Co.*,[38] there was involved a law of the State of Michigan permitting improvements of rivers and the charging of tolls for their use upon schedules of rates submitted to or approved by a State Board of Control. Suit was brought for such tolls, and the statute attacked as a regulation of interstate commerce. In the course of the Court's opinion Mr. Justice Field said:

"The Manistee River is wholly within the limits of Michigan. The State, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the State to another. *The internal commerce of a State,—that is, the commerce which is wholly confined within its limits,—is as much under its control as foreign or interstate commerce is under the control of the general government.*"[39]

This, to be sure, is an early decision; it involves water, not rail rates; the facts are much simpler than in the present case, because the medium of transportation does not pass the state line, and furthermore the opinion was rendered at a time when the interblending of operations in the conduct of interstate and local business by interstate carriers was unknown. But now, just as then, the inherent character of the transportation is the one and only test. Transportation is wholly within a State or it is not. There

[36] 230 U. S. 423.
[37] *Ibid.* pp. 423-433.
[38] (1887) 123 U. S. 288.
[39] 123 U. S. 295. Italics inserted.

can be no doubt as to the separability. The adjudications by the Supreme Court dealing with the question of when an interstate shipment ceases to be such, and becomes intrastate, and also with the taxation of the gross receipts of carriers are entirely sufficient to set at rest any doubt on this point.[40] Clearly, if intrastate business is separable from interstate business, so must intrastate rates be separable from interstate rates, because rates are the symbol of business. They are the receipts which are declared separable for the purpose of taxation. If separable for that purpose, why are they not equally separable for the purpose of regulation? Suppose, for example, a railroad doing *solely an intrastate* business, operates to and from the same points, in and out of the same terminals, as does another railroad engaged *solely in interstate* business. Suppose, further, that the former road, in order to get the business of the latter, greatly reduces its rates. Can it be denied that the economic necessity thus imposed upon the latter road to reduce its rates in order to meet the competition of the former is clear and direct? Yet can there be any question whatsoever as to the complete separability and independence of the two railroads, and therefore of their respective businesses? Suppose, further, that the State itself elected to construct and operate the purely intrastate railroad, instead of merely regulating it under private ownership. Could not the State have put into effect any rates that it chose, provided they were not confiscatory to the public? Certainly, and no authority, upon complaint that interstate rates were thereby affected, could have called it to account. If such would be the position of a State operating its own intrastate lines, wherein lies the difference when it authorizes a corporation, as its creature and agent, to perform the same function?

Again, in *United States* v. *Knight*,[41] a proceeding under the Federal Anti-Trust Act, the Supreme Court in holding that manufacture was not commerce, speaking through Chief Justice Fuller, used this language:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however

[40] See two articles by the author, Constitutional Limitations upon State Taxation of Foreign Corporations, 11 Columbia Law Rev. 393; The Commerce Clause and Intra-State Rates, 12 Columbia Law Rev. 321. See also United States Express Co. *v.* Minnesota (1912) 223 U. S. 335; Atchison, etc. Ry. Co. *v.* O'Connor (1912) 223 U. S. 280; Oklahoma *v.* Wells Fargo & Co. (1912) 223 U. S. 298; Bacon *v.* Illinois (1913) 227 U. S. 504; Susquehanna Coal Co. *v.* South Amboy (1913) 228 U. S. 665; Baltic Mining Co. *v.* Massachusetts (1913) 231 U. S. 68.

[41] (1895) 156 U. S. 1.

sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by their dual form of government; and acknowledged evils however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."[42]

In this case, to be sure, intrastate rates were not involved, yet the principle is identical, namely, that state authority is supreme within its appointed sphere, and the police power of the States includes the power over intrastate rates, as fully as it includes the power over manufacture.

It may be asked why may not Congress regulate intrastate rates, if it may require, as the Supreme Court has decided,[43] the use of safety appliances on purely intrastate trains? The reason is that while interstate and intrastate rates may be interdependent for economic or geographical reasons, this is not the same direct interdependence that necessarily exists between trains or cars operated over the same tracks. A rate is a charge for, not an instrument of transportation. Of course, physical interdependence is not *per se* the one and only criterion by which we determine whether or not the necessity for uniformity is real or potential, but this much we must find, namely, that the exercise of state authority, whether it be regulatory of rates, hours of labor, employers' liability, the equipment or inspection of rolling stock, or what not, necessarily impinges upon and burdens in a relatively immediate way the full exercise of federal authority. We do so find in the case of safety appliances, because of the direct connection between the equipment used in the two kinds of traffic. There is an inseparable interdependence of the very objects of the legislation.[44] But the Court did not nor can it find any such relation between interstate and intrastate rates. Why then, if these two classes of rates are separable, should the Court say that the action or non-action of Congress is the controlling factor? If these two classes of rates are separable, the power of the State over the intrastate rates must be plenary and exclusive, not servient, unless we do violence to the very words of the Constitution.

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[42]156 U. S. 13.

[43]Southern Railway Co. *v.* United States (1911) 222 U. S. 20.

[44]A somewhat kindred situation arose in the car distribution cases. See Interstate Commerce Commission *v.* Illinois Central R. R. Co. (1910) 215 U. S. 452; Baltimore & Ohio R. R. Co. *v.* United States ex rel. Pitcairn Coal Company (1910) 215 U. S. 481; Morrisdale Coal Co. *v.* Penn. R. R. Co. (1913) 230 U. S. 304.

The decision in *Southern Railway Co.* v. *United States,* the safety-appliance case just referred to, should remove the mote from the eye, and completely clarify the distinction which, it is believed, underlies the Minnesota cases. In every case cited by the Supreme Court to prove the principle that the plenary nature of the State's power depended upon the non-action of Congress, *the legislation in question operated directly upon the instrumentalities of interstate commerce or upon the very subject-matter of interstate commerce itself.* Herein lies the distinguishing feature which the Court seems not to have taken into consideration. The character of the legislation clearly shows this: pilotage regulations, protection and improvement of navigable waters, regulation of wharfage charges or tolls, quarantine regulations, inspection laws, laws governing nonfeasance or misfeasance of interstate carriers. These involve no question of regulation by a State of a purely internal matter, but rather the regulation by a State of matters on their face interstate. A case not referred to by the court, *Interstate Commerce Commission* v. *Goodrich Transit Company,*[45] may seem at first blush to bridge the gap between the cases referred to, and to establish a precedent for the court's reasoning in the Minnesota cases. In that case it was held that the Interstate Commerce Commission could compel an interstate carrier to disclose the records of all its business, including that which is purely intrastate. In answer to the argument that this was an unconstitutional usurpation of power by the federal government, the Court replied that "the requiring of information concerning a business is not a regulation of that business."[46] Similarly, the Court had previously held that because an injury to an interstate employee might be inflicted by a purely intrastate employee, the second federal employers' liability act covering such a case was not thereby invalid as a regulation of intrastate commerce, because, as the Court said "it is a mistaken theory that treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power."[47] In other words, it was again the instrumentality of interstate commerce, a human instrumentality in this case, that the act directly concerned and that only. The first federal employers' liability act was declared void[48] for the very reason that it comprehended the regulation of matters wholly intrastate—the em-

[45](1912) 224 U. S. 194.

[46]224 U. S. 211.

[47]The Second Employers' Liability Cases, Mondou *v.* N. Y., N. H. & H. R. R. Co. (1912) 223 U. S. 1, 51.

[48]Employers' Liability Cases (1908) 207 U. S. 463.

ployment of persons engaged wholly in intrastate commerce,—in short instrumentalities of such commerce. If this is forbidden, wherein lies the distinction upon which to base the opinion of the court in the Minnesota cases that Congress may regulate the rates of such commerce?

Thus from *Gibbons* v. *Ogden* down to the present time, each and every case has proceeded upon the theory that the right to control purely intrastate and domestic commerce is an attribute of sovereignty of each individual State, and that within this domain the jurisdiction of the State is as complete and exclusive as is that of the federal government in the regulation of commerce among the States. "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."[49] Susceptible, as are these words of Chief Justice Marshall, of a very broad interpretation, never, until the Minnesota cases, have they been declared to comprehend the principle of a dominant federal and a servient state power.

II.

Turning now to a consideration of the further question whether the action of the State of Minnesota was repugnant to any provision of the Interstate Commerce Act, the Court also answered this in the negative, by demonstrating that purely intrastate commerce had always been expressly excepted from the operation of the Act by the proviso contained in the first section. "The fixing of reasonable rates for intrastate transportation was left," said the court after giving a history of the Act, "where it had been found; that is, with the States, and the agencies created by the States to deal with that subject. *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612, 620, 621."[50] Thus far the Court's reasoning is clear, succinct and eminently sound. When pressed, however, with the more troublesome argument that the provisions of Section 3 of the Act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, applied to an unreasonable discrimination between localities in different

[49] 9 Wheat. 195.
[50] 230 U. S. 421.

States, as well when arising from an intrastate rate as compared with an interstate rate, as when due to interstate rates exclusively, the Court replied:

"If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87. In the present case there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review."[51]

It is not believed that the provisions of Section 3 of the Act can be so extended by judicial construction, although there is at least some slight intimation to the contrary in the very guarded words of the Court just quoted. However this may be, the Court, reverting to its theory, expressed earlier in the first part of the opinion, of a dominant federal and a servient state power, assumed a position even more radical by strongly intimating that the Interstate Commerce Act might be amended without amending the Constitution so as to include specifically the regulation of intrastate rates.

"If the situation has become such," said the Court, *"by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments*

[51] 230 U. S. 419-20.

the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."[52]

It will, of course, be asked what just criticism can be made, from the point of view of constitutional law and our fixed institutions—for with economic or other considerations we are not here concerned—assuming that the Supreme Court has thus extended the scope of the Commerce Clause by judicial construction? That criticism may be well founded, must be at once apparent from a consideration of two cases which are now pending before the Supreme Court. In these, which are companion cases and are known as the Shreveport cases,[53] the Commerce Court, without waiting for an amendment to the Interstate Commerce Act, took the bull by the horns and upheld an opinion rendered by the Interstate Commerce Commission that an intrastate rate, involuntarily established by order of the Texas commission, may be subject to an order of the Commission under the Interstate Commerce Act as at present existing, whereby such a rate is declared to involve an undue prejudice as against an interstate rate, and the two rates are required to be equalized; that is, in effect, that the state compelled rate is not binding.

The facts in these cases are briefly as follows: In March, 1911, the Railroad Commission of Louisiana filed a petition with the Interstate Commerce Commission against The Texas & Pacific Railway Company, the Houston East & West Texas Railway Company, the Houston & Shreveport Railroad Company, the St. Louis & Southwestern Railway Company, and various other carriers, complaining that these carriers discriminated in the rates carried on the various classes and commodities of traffic from Shreveport, Louisiana, to Texas, in that the rates charged by the carriers from Texas distributing centers, such as Houston, Dallas and other

[52]230 U. S. 432-3. Italics inserted.

[53]Meredith *et al.*, constituting the Railroad Commission of Louisiana *v.* St. Louis S. W. Ry. Co. *et al.* (1912) 23 I. C. C. Rep. 31; Texas & Pacific Ry. Co. *v.* United States (Interstate Commerce Commission *et al.*, Interveners) (1913) 205 Fed. 380; Houston East and West Texas Ry. *et al. v.* United States (Interstate Commerce Commission *et al.*, Interveners) (1913) 205 Fed. 391.

points in the direction of Shreveport, to points within the State of Texas, the trade of which was in competitive territory between such Texas distributing centers and Shreveport, were less for equal distances than the rates carried by such carriers on the same classes and commodities from Shreveport to such Texas competitive points, and that the Texas intrastate rates applied between such Texas points were less under substantially similar conditions than the interstate rates from Shreveport to such competitive points. The prayer of the complainants was that the Interstate Commerce Commission establish the same basis of rates of transportation between Shreveport and East Texas points as was accorded by the defendants to Texas competitors of Shreveport interests in the same line of business for the same distance. Complaint was also made that the interstate rates from Shreveport to such Texas points were unreasonably high. The Interstate Commerce Commission, after due and regular hearing, made its report and order upon this complaint in March, 1912. It was found therein that certain class rates were unjust and unreasonable, and an order was made fixing reasonable rates, but this order is not involved in the appeals. It was not found that the commodity rates complained of from Shreveport to the several Texas points were unreasonable *per se,* and the order of the Interstate Commerce Commission with regard to the commodity rates was based solely upon the proposition that the Texas intrastate rates applied by the carriers to and from Dallas, Houston, and other distributing centers, to the points within the State of Texas, were less for substantially similar distances than the interstate rates from Shreveport to said points, and that thereby the intrastate Texas rates applied by the carriers were discriminative as against the interstate rates. The Texas & Pacific Railway Company, the Houston East & West Texas Railway Company, and the Houston & Shreveport Railroad Company, were required to cease and desist from exacting any higher rates for the transportation of any article from Shreveport to Dallas, and points on the Texas & Pacific Railway intermediate thereto, than are contemporaneously exacted for the transportation of such article from Dallas towards Shreveport, for an equal distance; and from exacting any higher rates for the transportation of any article from Shreveport to Houston, and points on the line of the Houston East & West Texas Railway and the Houston & Shreveport Railroad intermediate thereto, than are contemporaneously exacted for the trans-

portation of such article from Houston towards Shreveport, for an equal distance.

The Commission was divided, four to three. Six separate opinions were written, the majority opinion by Commissioner Lane, and concurring opinions by Commissioners Prouty (Chairman) and Clark, while dissenting opinions were written by Commissioners Clements, Harlan and McChord.[54] Suits to enjoin the order of the Commission were filed by the carriers in the United States Commerce Court, with the result that the order of the Commission was unanimously upheld.

Prior to this opinion the Commission had always consistently

[54]Commissioner Lane's opinion is totally unconvincing from a legal standpoint. He thus concludes: "The interstate carrier which adopts a policy, even under state direction, that makes against the interstate movement of commerce must do so with its eyes open and fully conscious of its responsibilities to the federal law which guards commerce 'among the states' against discrimination.

"It is suggested that the exercise of such power to end discrimination between rates within a state and rates to interstate points must surely lead to a conflict in which the jurisdiction of one sovereignty or the other must give way. To this suggestion the one and sufficient answer is that when conditions arise which in the fulfillment of its obligation and the due exercise of its granted power to regulate commerce among the states make such course necessary the national government must assume its constitutional right to lead." 23 I. C. C. Rep. 46.

Chairman Prouty, contrary to Commissioner Lane, expressly stated that prior decisions of the Commission should be overruled, when inconsistent with the view of the majority in this case. "When the federal authority does act, then the state cannot by its action interfere, for in case of actual conflict the state must yield." 23 I. C. C. Rep. 50.

Commissioner Clark said: "Whether or not the Congress has exercised its jurisdiction in these premises and whether or not it has delegated to us power to remove such discriminations and preferences are questions which apparently can never be settled until they have been passed upon by the court that is empowered to speak the last word. In this question as between two states possessing equal rights under the constitution and equal rights to federal protection, discrimination that is unjust or preference that is undue, should, I think, be abated by federal authority, and so long as there is doubt it should be resolved in favor of that course which is harmonious with the fundamental and recognized purpose of the act to regulate commerce." 23 I. C. C. Rep. 51-52.

Commissioner Clements, mindful of the express limitations of the Act, said: "The conclusion and order of the Commission in this case mark a new departure in the interpretation of the statute as to the scope of its authority, from its steadfast attitude toward this fundamental question in all previous cases." 23 I. C. C. Rep. 53.

Commissioner Harlan: "I think that the Congress in aid, or rather in protection, of interstate commerce may forbid discriminations by a railroad or other instrument of interstate traffic in favor of state traffic. This however it has not undertaken to do." 23 I. C. C. Rep. 54-5.

Commissioner McChord's dissenting opinion is eminently logical and sound, and in complete accord with prior decisions. He thus summarizes: "My position is that this Commission should confine itself within the four corners of the law of its creation, usurping neither the legislative function of the Congress nor the judicial power of the courts." 23 I. C. C. Rep. 63.

refused to usurp the functions of the States in regard to rate-making.[55] As previously stated, the Supreme Court cannot, it is believed, properly uphold the Commission and the Commerce Court. For, although it has never passed upon this precise question, it has decided that the prohibition of Section 3 of the Act is directed only against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers, and does not relate to acts, the results of conditions wholly beyond the control of the carriers, such as competition, and presumably, therefore, statute, court decree or order of an administrative or semi-judicial body.[56] The Commerce Court attempted to distinguish this case on the ground that it primarily involved the long and short haul clause of the original fourth section of the act, rather than the third section, and added (Judge Knapp):

"Moreover, the administrative authority of the Commission has been materially increased by the amendments of 1906 and 1910, as the Supreme Court observed in the recent Proctor and Gamble case, (225 U. S. 282, 297), and it may be open to doubt whether decisions under the former fourth section would be followed in cases arising under the amended statute."[57] This attempted distinction is unconvincing. The Court, in effect, swept aside all precedent. Note the language of one of the concluding paragraphs of the opinion:

"When this order was made, upon the facts so ascertained and reported, it had the effect, in our judgment, of relieving petitioner from further obligation to observe the intrastate rates which the Texas authorities had prescribed. The petitioner was no longer under compulsion in respect of those rates, because the rate situation disclosed by the inquiry was subject in its entirety to the provisions of the Federal statute and the administrative control of the Commission. The order of the Commission therefore operated to release petitioner, as regards the intrastate rates in question, from

[55]See in the Matter of Freight Rates (1905) 11 I. C. C. Rep. 180; Hope Cotton Oil Co. *v.* Texas & Pacific Ry. Co. (1907) 12 I. C. C. Rep. 266; Reliance Textile & Dye Works *v.* Southern Ry. Co. (1903) 13 I. C. C. Rep. 48; Williams Co. *v.* Vicksburg, S. & P. Ry. Co. *et al.* (1909) 16 I. C. C. Rep. 482; Andy's Ridge Coal Co. *v.* Southern Ry. Co. (1910) 18 I. C. C. Rep. 405; Saunders *v.* Southern Express Company (1910) 18 I. C. C. Rep. 415; Alpha Portland Cement Co. *v.* B. & O. R. R. Co. *et al.* (1912) 22 I. C. C. Rep. 446. In fact, since the opinion in the Shreveport case the Commission refused to remedy a discriminative situation growing out of state rates, but in so doing failed to distinguish the Shreveport case. Southwestern Shippers Traffic Assn. *v.* Atchison, T. & S. F. Ry. Co. *et al.* (1912) 24 I. C. C. Rep. 570; but see Keogh *v.* Chicago, etc. Ry. Co. (1913) 26 I. C. C. Rep. 73.

[56]East Tenn. etc. Ry. Co. *v.* Interstate Commerce Commission (1901) 181 U. S. 1, 18.

[57]205 Fed. 385.

the restraint imposed by the State of Texas; and thereupon petitioner became entitled, if it did not choose to reduce its interstate rates, to comply with the order by advancing its Texas rates sufficiently to remove the forbidden discrimination. Its obedience was due to the superior authority, and it ceased to be bound by any inconsistent obligations. Whether petitioner should have applied to the courts for relief in the premises, basing its application upon the Commission's order and the rights of petitioner thereunder, or could advance its Texas rates in the first instance, relying upon the order as a defense against any prosecution under Texas laws, is not for us to determine. It is sufficient to hold, as we do, that petitioner can not resist the order on the ground of involuntary action, because the effect of that order was an exemption of these intrastate rates from Texas authority."[58]

The closest case referred to by the Commerce Court as an authority for its decision, is *Louisville & Nashville Railroad Co.* v. *Eubank*.[59] But this case, while admittedly a "hard" one in the "twilight zone," warrants no such conclusion. There the lower court had construed the long and short haul provisions of the Kentucky constitution, "as embracing," to use the words of Mr. Justice Hughes in the Minnesota cases, "a long haul from a place outside to one within the State (Nashville and Louisville), and a shorter haul on the same line and in the same direction between points within the state. The court held that, so construed, the provision was invalid as being a regulation of interstate commerce, because it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state law. (184 U. S. pp. 41, 43.) The authority of the former decision [L. & N. R. R. Co. *v.* Ky., 183 U. S. 503] upholding the state law, as applied to places all of which were within the state, was in no way impaired, and the court fully recognized the power of the state to prescribe maximum charges for intrastate traffic although carried over an interstate road to points on the state line.

[58] 205 Fed. 389-90. Judge Mack filed a concurring opinion, but it was with considerable hesitancy that he did so. "In as much, however, as there seems to be some basis, though slight, for the view that the failure of the railroads to attack the Texas rates was due to their voluntary or negligent acquiescence therein, and that therefore these rates may be said to have been not compelled, but voluntary, in the sense of having been voluntarily assented to, instead of having been actively attacked, and inasmuch as the conclusions of my brethren are based in part at least upon this view, I concur, for this reason only, in upholding the Commission's order." (p. 391.)

[59] (1902) 184 U. S. 27, 41. The correctness of this decision is believed to be open to considerable doubt, in the light of subsequent decisions. See an article by the present author in 11 Columbia Law Rev. 321.

(*Id.* pp. 33, 42)."[60] Furthermore, there was no intimation whatever in this case that there is a dormant federal power, which might, if put into action, include the regulation of intrastate rates, as announced in the Minnesota cases.

"We should have no Union," said the Governors in pleading for the maintenance of States' Rights before the Supreme Court of the United States in the Minnesota cases, "if the Constitution had not made the internal commerce of the States distinct from other commerce, and left full control of the former with the States when it gave full control of the latter to Congress. Whatever the risk to commerce as a whole, the people chose to take it, in order to avoid risks which they considered worse; and the wonderful development of both state and interstate commerce has proved the wisdom of their choice. It is for them alone to reverse that choice by amending their Constitution, if they think the balance of advantage has changed."[61]

Why did not the Supreme Court in the Minnesota cases face the situation squarely and admit that amendment of the Constitution, albeit it is difficult of attainment (and rightly so), is the only true remedy? A few years ago in a case involving the reclamation of arid lands in the west, the federal government claimed the paramount right to control the waters of the Arkansas River to aid in the reclamation of these lands. But the Court, in a masterly opinion by Mr. Justice Brewer, turned a deaf ear to the alluring argument of expediency and denied this right, saying:

"The preamble of the Constitution declares who framed it, 'we the people of the United States,' not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not forsee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by

[60] 230 U. S. 429.

[61] Brief (p. 30) of *Amici Curiae*, Hon. Judson Harmon, Herbert S. Hadley, Charles H. Aldrich, filed by leave of the court.

any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning." * * * * * * * * * * * *

"At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State, in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised."[62]

True, in the case just referred to, the Court was not called upon to construe express language of grant, but rather of restriction. But correct constitutional interpretation must necessarily be the same in both directions, as is explained in this case. So this opinion is but the reiteration of Chief Justice Fuller's words of warning previously quoted that "acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."[63] Where, in the Minnesota cases, do we find that fidelity both to the spirit and the purpose of the Constitution so predominant in these prior decisions, and so necessary to the preservation of our form of government? It is not there.

WILLIAM C. COLEMAN.

BALTIMORE.

[62]Kansas *v.* Colorado (1906) 206 U. S. 46, 91-92.

[63]156 U. S. 13.